

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MORRIS DAJUAN HOWARD,

Defendant-Appellee.

---

UNPUBLISHED  
February 13, 2007

No. 264763  
Wayne Circuit Court  
LC No. 05-001204-01

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and assault with intent to rob while armed, MCL 750.89. Defendant was sentenced to 35 to 80 years' imprisonment for the murder conviction and 15 to 80 years' imprisonment for the assault conviction. We affirm.

Defendant argues that he was denied his rights to confrontation and due process when the trial court excluded any reference to polygraph test results. We disagree. Polygraph test results are inadmissible at trial. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). "The bright-line rule that evidence relating to a polygraph examination is inadmissible is well established." *Id.* Therefore, the trial court correctly denied defendant's motion to admit evidence that Julian Brooks, defendant's acquaintance and a prosecution witness at trial, failed two polygraph tests. Although defendant asserts in his brief that federal courts have found polygraph test results admissible in certain contexts, "it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until [the Supreme] Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

Defendant argues that the trial court should have admitted the polygraph test results because the evidence would have been used to affirm, rather than impeach, the witness' credibility at trial. Assuming that this was solely a matter of attempted bolstering,<sup>1</sup> defendant

---

<sup>1</sup> Defendant would be bolstering Brooks' account of the crime as conveyed at trial, while also impeaching Brooks' account of the crime as provided prior to trial but brought out during his testimony.

fails to cite to any Michigan cases to support his assertion, and this Court need not search for authority to support defendant's argument. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Moreover, "virtually all of the polygraph cases in Michigan have involved attempts to directly bolster the present testimony of a witness." *People v Rodgers*, 66 Mich App 658, 661-662; 239 NW2d 701 (1976). However, these attempts have been held to be improper. *Id.* As noted above, Michigan has a bright-line rule against admitting polygraph results at trial. *Jones, supra* at 355.

We note that although defendant frames this issue as violating his constitutional rights to confrontation and due process in his "statement of questions presented," merely framing an issue as constitutional does not make it such. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994). The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. However, "[n]either the Sixth Amendment's Confrontation Clause nor due process confers on a defendant an unlimited right to cross-examine on any subject." *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). Further, "[c]ross-examination may be denied with respect to collateral matters bearing only on general credibility[.]" *Id.*, citing *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984).

Defendant had the opportunity to cross-examine Brooks. The crux of this cross-examination was whether the police had influenced Brooks to implicate defendant. Specifically, Brooks admitted during cross-examination that he had previously lied under oath when implicating defendant in order to protect himself because the police told him that defendant had accused him of the killing. Therefore, defendant had an adequate opportunity to effectively raise the credibility issue through cross-examination. Defendant was not deprived of his constitutional rights.

Defendant next argues that 911 calls that were admitted into evidence were testimonial in nature and denied him his right to confrontation.<sup>2</sup> We disagree. We review a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, we review preliminary questions of law pertaining to the admissibility of evidence de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). *Id.* Under the Confrontation Clause, testimonial statements are admissible against a defendant only if the declarant was unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Such testimonial statements that are offered for their truth and not subject to cross-examination are inadmissible regardless of the rules of evidence. *Id.* at 50-51, 53-54, 61.

In *Davis v Washington*, \_\_\_ US \_\_\_, 126 S Ct 2266, 2273; 165 L Ed 2d 224 (2006), the United States Supreme Court found that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary

---

<sup>2</sup> We note that defendant does not challenge the 911 call's admissibility as an excited utterance under MRE 803(2).

purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” There, a victim of domestic violence disclosed to a 911 operator the events relative to an assault being committed against her by the defendant as the situation was unfolding. *Davis, supra* at 2271. In arriving at its conclusion that the statements were nontestimonial and admissible, the Court explained that an “initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to ‘establish or prove’ some past fact, but to describe current circumstances requiring police assistance.” *Id.* at 2276 (alterations deleted).<sup>3</sup> On the basis of *Davis*, this Court has also held that responses to a 911 operator’s questioning, which questioning reflected a primary purpose to enable police assistance to meet an ongoing emergency, were not testimonial. *People v Walker (On Remand)*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (Docket No. 250006, issued November 21, 2006), slip op at 3-4.

The statements made during the 911 calls in this case were similar to those made in *Davis*. Specifically, here, the callers frantically described a shooting that had just occurred in the area of 214 West Savannah and described two suspects who were involved and still near the scene as well as the truck in the alley and the man who had been shot. Given that these calls were made during an ongoing emergency to request police assistance, they were nontestimonial and their admission into evidence did not violate defendant’s right to confrontation.

Defendant next argues that the trial court’s response to a question posed by the jury during deliberations foreclosed the jury’s opportunity to rehear testimony. We review this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). MCR 6.414(J) provides:

If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Citing the language now found in MCR 6.414(J), our Supreme Court stated that “[a] defendant does not have a right to have a jury rehear testimony. Rather, the decision whether to allow the jury to rehear testimony is discretionary and rests with the trial court.” *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000).

During its deliberations, the jury requested to rehear certain statements and testimony. After the jury’s request, the court explained that it would take at least 90 days for the transcripts to be prepared. However, the court noted that the reporter would begin to prepare her notes to read back to the jury, although this process would take the reporter “as long to read it or play it as it took for the jury to hear it in the first place.” The court then ordered the jury, in the

---

<sup>3</sup> The Court noted that if 911 operators are not law enforcement officers, they nonetheless act as agents of law enforcement when they conduct interrogations of 911 callers. *Davis, supra* at 2274 n 2.

meantime, to continue its deliberations. The court did not deny the jury's request to rehear the testimony. Instead, the court expressly conveyed to the jurors that the testimony could be heard later, if still necessary, after the reporter's notes were prepared; review was not foreclosed. Additionally, the jury was not precluded from making additional requests for testimony. There was no error.

Defendant next argues that the trial court erroneously departed from the appropriate sentencing guidelines range and made an independent finding of guilt. "[A] sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004); MCL 769.34(10).

A trial court may depart from a sentencing guidelines range provided it has a substantial and compelling reason and it states this reason on the record. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A substantial and compelling reason is one that is objective and verifiable. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Objective and verifiable facts or factors are those that constitute "actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *Id.* These factors must "keenly" or "irresistibly" grab the court's attention and be of "considerable worth." *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Moreover, the court may not depart from the guidelines range based on an offense or offender characteristic already accounted for in determining the appropriate sentence range unless the "court concludes that the characteristic was given inadequate or disproportionate weight." *People v Havens*, 268 Mich App 15, 18; 706 NW2d 210 (2005), citing MCL 769.34(3)(b).

Defendant's sentencing guidelines range was 15 to 25 years for second-degree murder. However, the trial court imposed a sentence of 35 to 80 years. During sentencing, the trial court explained, "I'm going to go outside of the guidelines because this really is a felony murder and that's what the jury found." In arriving at this decision, the court noted its concern that defendant "will get out of jail while he's still young enough to continue doing this kind of evil deed."

The determination that defendant might commit a similar crime upon his release from prison is only speculative and is neither external to the mind of the judge nor capable of being confirmed. *Abramski, supra* at 74. Thus, it is not a substantial and compelling reason to support an upward departure from the appropriate guidelines range. However, that defendant was convicted of offenses comprising the elements of felony murder is objective and verifiable.<sup>4</sup> Specifically, defendant was convicted of second-degree murder and assault with intent to rob while armed. There was evidence that defendant committed a murder with the requisite malice during the commission or attempted commission of a felony. It is clear that felony murder is not

---

<sup>4</sup> Felony murder is second-degree murder with the additional element of the commission or attempted commission of an underlying felony as enumerated in MCL 750.316. *People v Carter*, 395 Mich 434, 437; 236 NW2d 500 (1975).

already accounted for in determining the appropriate sentencing guidelines range for second-degree murder given that felony murder carries a mandatory sentence of life imprisonment, MCL 750.316(1)(b).<sup>5</sup> Thus, the trial court articulated a substantial and compelling reason for the departure. *Havens, supra* at 18.

Furthermore, “[a]lthough a trial court may not make an independent finding of guilt with respect to a crime for which a defendant has been acquitted, and then sentence the defendant on the basis of that finding, the court in fashioning an appropriate sentence may consider the evidence offered at trial . . . including other criminal activities established even though the defendant was acquitted of the charges.” *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998), citing *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997), and *People v Coulter (After Remand)*, 205 Mich App 453, 456-457; 517 NW2d 827 (1994). The *Gould* panel noted that a sentencing court may consider evidence presented at trial “as an aggravating factor in determining the appropriate sentence.” *Gould, supra* at 89. The trial court, in its manner of speaking or words chosen, arguably made an independent finding of guilt relative to felony murder, given defendant’s acquittal on the charge of felony murder despite the jurors indirectly finding that the elements of the crime were proven beyond a reasonable doubt considering the verdicts rendered. The court, however, did not actually enter a judgment of sentence finding defendant guilty of felony murder, nor did it sentence defendant to life imprisonment without parole as mandated for first-degree felony murder. Rather, the trial court made the permissible determination that the evidence was sufficient to convict defendant of the higher offense of which he was acquitted. *People v Shavers*, 448 Mich 389, 393-394; 531 NW2d 165 (1995). In *Shavers*, the defendant was charged with open murder but convicted of voluntary manslaughter, and the trial court departed upward from the guidelines based on the horrific evidence regarding the nature of the crime. This Court set aside the sentence; however, our Supreme Court reversed this Court, adopting the dissenting opinion from below. *Id.* at 390-393. The Court stated:

[There is no] basis for the conclusion that the sentencing judge improperly found that the defendant was actually guilty of first-degree murder. As indicated by Judge Murphy, the sentencing judge was making permissible inferences from the evidence introduced at trial. The defendant received a manslaughter sentence, not a murder sentence. [*Id.* at 393-394.]

Here, defendant received a second-degree murder sentence, not a felony murder sentence, and the departure was supported by a substantial and compelling reason that was objective and verifiable and of considerable worth. The trial court’s determination that a substantial and compelling reason for departure existed, i.e., facts establishing felony murder, did not constitute an abuse of discretion, or in other words, the court chose an outcome falling within a reasonable

---

<sup>5</sup> Offense Variable 12, MCL 777.42, provides for scoring when there are contemporaneous felonious criminal acts; however, zero points were scored here because acts that do not and will not result in a separate conviction can only be considered and defendant was of course convicted relative to the offense of assault with intent to rob while armed. MCL 777.42(2)(a)(ii).

and principled range of outcomes. *Babcock, supra* at 265-269. Moreover, the extent of the departure was proportionate to the seriousness of defendant's conduct. See *id.* at 262.

Notwithstanding this, where a trial court articulates multiple reasons for an upward departure and only some of those reasons are substantial and compelling, this Court must remand the case for resentencing or rearticulation if it cannot determine whether the trial court would have departed and departed to the same degree solely on the basis of the legitimate substantial and compelling reasons. *Id.* at 271. Here, the trial court noted a concern that did not constitute a substantial and compelling reason. However, we conclude that the trial court would have departed and would have departed to the same degree on the basis of the proper substantial and compelling reason it provided, given its explicit explanation that the "extenuating circumstance" in this case was that defendant actually committed felony murder.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ William B. Murphy  
/s/ Patrick M. Meter